SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 377

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

versus

CITY OF MOBILE,
Appellee.

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT.

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OCTOBER TERM, 1968.

No. .....

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

versus

CITY OF MOBILE,
Appellee.

STATEMENT AS TO JURISDICTION.

In compliance with Rules 13 and 15 of the Rules of the Supreme Court of the United States, appellant submits herewith this statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Alabama entered in this cause.

I.

OPINION BELOW.

The opinion of the Supreme Court of Alabama in this case has not yet been reported, either officially or unofficially. A copy of the opinion, however, is attached hereto as Appendix A.

II.

JURISDICTION.

1. This was a suit filed in the circuit court for the thirteenth judicial circuit of Alabama (Mobile County) for Declaratory Judgment authorized by Title 7, Code of Ala., Art. 12, Sec. 156-168, and an injunction, by Appellant, a taxpayer, against the City of Mobile, to determine the validity of a recently enacted city photographer's license, and, *pendente lite,* restrain the enforcement of the license, including its criminal provisions. When the City agreed to withhold enforcing the license *pendente lite,* this aspect of the Bill of Complaint was abandoned. The City's demurrer to the Bill was sustained. After further amendment, the City re-filed its demurrer, which was sustained, and the Bill dismissed. From this final decree, taxpayer appealed to the Supreme Court of Alabama.

2. On the 13th day of June, 1968, the Supreme Court of Alabama affirmed the decree of the circuit court, and it is this judgment which is sought to be reviewed on this appeal, and for which a Notice of Appeal was filed with the Clerk of the Supreme Court of Alabama on the 8th day of July, 1968. No application for rehearing was filed in that Court, and its judgment is now final.

3. The statutory provision believed to confer on this Court jurisdiction of this appeal is

28 U. S. C., sec. 1257 (2).

4. Among the cases believed to sustain the jurisdiction of this Court in this case are:

1.

Decision on Taxpayer's Rights Under the Federal Constitution Cannot Be Avoided in State Courts by Spurious Application of State Rules.

Terre Haute & Indianapolis R. Co. v. Indiana, 194 U. S. 579, 589 (1904);
Ward v. Love County, 253 U. S. 17, 22 (1920);
First Nat. Bank v. Anderson, 269 U. S. 341, 346 (1926);
Allied Stores v. Bowers, 358 U. S. 522, 525 (1959).

2.

Licenses Used to Discriminate Against Interstate Commerce Are Invalid Under the Commerce Clause.

Portland Cement Co. v. Minnesota, 358 U. S. 450, 458 (1959);
Sprout v. South Bend, 277 U. S. 163, 171 (1928).

3.

Non Discriminatory Licenses on Interstate Commerce Are Invalid Under the Commerce Clause.

Leloup v. Port of Mobile, 127 U. S. 640, 648 (1888);
Crutcher v. Kentucky, 141 U. S. 47, 58 (1891);
Spector Motor Service v. O'Connor, 340 U. S. 602, 608, 609 (1951).

4.

The Right of a State to Fractionalize Interstate Activity and License Essential Components Should Be Finally Determined by This Court in This Case.

(1) The Decision of the Supreme Court of Alabama on This Question Is Probably Wrongfully Decided.

Nippert v. Richmond, 327 U. S. 416, 423 (1946).

5.

A Flat Per Diem Admission Privilege License Cannot Be Imposed on Interstate Activity.

West Point Grocery Co. v. Opelika, 354 U. S. 390 (1957);
Leloup v. Port of Mobile, 127 U. S. 640, 648 (1888).

6.

The Overwhelming Weight of Authorities Hold That Such Privilege Licenses as Are Here Involved Are in Violation of the Commerce Clause.

Olan Mills, Inc. v. City of Tallahassee, ... Fla. ..., 100 So. 2d 164 (1958), **cert. den.** 359 U. S. 924.

7.

Privilege Licenses Enforceable With Criminal Sanctions Must Satisfy Substantive Due Process.

Raley v. Ohio, 360 U. S. 423, 438 (1959);
Ashton v. Kentucky, 384 U. S. 195, 200 (1966);
Bates v. Little Rock, 361 U. S. 516, 526 (1960).

5. The City License Schedule sought to be imposed on taxpayer's activities was City Ordinance 31-083, Section One, paragraph (d), which had been added to the remainder of the Schedule on August 31, 1965. The entire schedule is:

An Ordinance Further Amending Section One of the License Code of the City of Mobile, Alabama, Said License Code Being Duly Adopted on December 21, 1954.

31-083 1965

Be It Ordained by the Board of Commissioners of the City of Mobile, that the license Code of the City of Mobile for the year 1955 and each succeeding year as amended, is hereby further amended by changing sub-section of

Section One of the said License Code in the following particulars:

Section One: The paragraph numbered three hundred and nine and entitled "Photographers" is hereby amended to read as follows:

309. PHOTOGRAPHERS:

(a) A studio photographer is hereby defined to be every person, firm or corporation maintaining a studio within the City for the purpose of taking therein, personally or through his or its agents, partners, or employees, photographs of persons at such studio, and every person, firm or corporation maintaining in any one established place within the City for at least one year complete equipment for the taking of photographs, including all finishing processes, whether inside or outside of such place; and shall pay an annual license as follows:

Doing less than $5,000 gross annual business ..	25.00
$ 5,000.00 and less than $10,000.00	50.00
$10,000.00 and less than $15,000.00	75.00
$15,000.00 and less than $20,000.00	100.00
$20,000.00 and less than $25,000.00	125.00
$25,000.00 and less than $30,000.00	150.00
$30,000.00 and over	175.00

(b) In addition, photographers defined above who go about the City of Mobile, Alabama, taking photographs and using an animal or device as a prop 100.00

(c) In addition, each photographer taking photographs of pedestrians on the streets in the City of Mobile and handing to said pedestrians a card or other paper stating the terms of purchase and the place where the photograph may be obtained shall pay an annual license tax of 100.00

(d) Photographers, or persons, firms or corporations taking photographs or offering photography service for compensation, who do not qualify as "Studio Photographers" defined in (a) above, and who are neither Tran-

sient nor Itinerant Photographers as defined in Sec. 27-28, Mobile City Code (1955), each, per day $50.00

(e) All other persons, firms or corporations taking photographs for compensation within the City are hereby defined to be Transient Photographers.

Transient Photographers $500.00

(f) No person shall engage in the business of transient photographer without first having obtained a license to do so, which license shall be granted upon payment of the license tax as herein provided.

When one or more persons are employed to take photographs for any such transient photographer, a separate license shall be obtained for each employee.

(g) Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor. Each day upon which such person, firm or corporation shall violate this section shall be deemed a separate offense.

(h) And in addition, film developing, photographic supplies and cameras: same as Merchants.

Section Two: This ordinance shall be effective on the date of its adoption and shall remain in full force and effect and apply to each calendar year thereafter from year to year.

Section Three: Each and every provision of this ordinance is hereby declared to be an independent provision and the holding of any provision hereof to be void and invalid shall not affect any other provision hereof, and it is hereby declared that the other provisions of this ordinance would have been enacted regardless of any provision which might have been held invalid.

Adopted: August 31, 1965.

Richard L. Smith,
City Clerk.

III.

QUESTIONS PRESENTED.

Taxpayer is engaged in the business of soliciting orders for and taking baby pictures throughout the country, out of Charlotte, North Carolina, operating in and using the facilities of a nation-wide chain of moderate priced department stores, J. C. Penney Company. The City of Mobile, Alabama, sought to impose a discriminatory per diem privilege license tax on taxpayer for these activities, with threats of criminal prosecution of taxpayer's employees. The taxpayer filed a suit for declaratory judgment to protect its rights guaranteed under the Federal Constitution against the license. The questions presented are:

(1) May the State court deprive taxpayer of protection for its constitutional rights by a spurious application of the rule of no standing to avoid considering the protection of taxpayer's constitutional rights?

(2) Whether or not taxpayer's activities in interstate commerce are subject to a discriminatory, per diem admission privilege license tax as a condition precedent to the taxpayer's engaging in such business in the City of Mobile;

(3) Whether or not the unbroken chain of interstate activities here involved may be fractionalized into parts on which city licenses may be imposed.

(4) Whether or not taxpayer is subject to a prohibitive, vague and imprecise license with criminal sanctions for interstate activity, which license was enacted for and has been applied only to taxpayer.

IV.

STATEMENT OF THE CASE.

In 1963, Taxpayer came to Mobile to engage in the business of taking .59¢ baby pictures on the premises of J. C. Penney Company, a medium-priced department store, under arrangement previously made between the parties. The City demanded of taxpayer a transient photographer's license for $500.00 as provided in the schedule quoted above. Taxpayer then retained counsel and this $500.00 was refunded to taxpayer under an agreement that J. C. Penney obtain a "studio photographer's" license. Thereupon, J. C. Penney took out a "studio photographer's" license in 1963, and it has taken out this license yearly thereafter, including the year here involved.

On Aug. 31, 1965, without prior notice to taxpayer or J. C. Penney, the City amended the photographer's license by adding what is now paragraph (d). Taxpayer was informed that this was the result of activities of local photographers who were unable or unwilling to meet the competition of taxpayer's prices for baby pictures, and this paragraph (d) was drafted not to raise revenue for the City but for the purpose of excluding taxpayer from doing business in Mobile.

After advertising a visit to Mobile for the period Oct. 12-16, 1965, but being without knowledge of the amended photographer's license, taxpayer's employee-photographer came to Mobile on Oct. 12, 1965. This employee was met by a license officer of the City and presented a bill for this license for the five days' operations yet to be had. Actually, the bill was made out to "J. C. Penney Co.," but it was for taxpayer's activities about to begin, and it was given to taxpayer's employee. Upon failure to pay this tax bill, taxpayer's employee was threatened with criminal prosecution unless this bill was paid. As a result of this, this suit was brought.

Thereupon, it was agreed between taxpayer and the city that if the court held this license constitutionally applicable to taxpayer's activities, then taxpayer, not J. C. Penney, would pay this tax to the city with interest, for every day's operation by taxpayer from Oct. 12, 1965, to the date of such decision. For this the city agreed not to arrest or threaten to arrest any employees of appellant operating in the city for this paragraph (d) license pending such court decision. That agreement is still in effect, and taxpayer is still operating in Mobile at regular intervals. Thereupon, taxpayer made no further effort to obtain an injunction *pendente lite* against the city's enforcement of this license against taxpayer.

The Bill of Complaint alleges that taxpayer was engaged in the photography business in Charlotte, North Carolina, specializing in photography of children. It had no office, inventory, developing laboratory of agent in Alabama. J. C. Penney Company was a department store which entered into an agreement for taxpayer to engage in taxpayer's photography work in the Penney stores, one of which was in Mobile. The dates of visits by taxpayer's photographers were fixed by the local Penney store manager. Newspaper advertisements were run by Penney, but its cost was deducted from the gross receipts. Taxpayer prepared postal cards notifying its customers of the visits, which were mailed out by Penney.

Taxpayer's photographers then came to Mobile, solicited orders for pictures, took pictures, returned the exposed film to Charlotte, with the customers' orders for pictures, and if the orders were accepted, the pictures were developed, printed and finished. The finished pictures were returned to the Penney store, and they were paid for and picked up by the customer. The payments were made to the Penney employees only, and not to taxpayers' photographers or agents.

Penney retained 12½% of the receipts as its commission, and after deducting expenses, remitted the balance to taxpayer. Penney did no photography work in Mobile. This was done by taxpayer on Penney's premises, though subject to Penney's store rules as to hours, time, place, etc., of taking the pictures.

This was single-visit photograph, as distinguished from three-stage photography engaged in by Olan Mills as shown in **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961).

The justiciable controversy alleged in the Bill expressly raises the federal questions, posing to the circuit court:

> "(a) Whether or not plaintiff is engaged in interstate commerce?
>
> * * * * * * *
>
> (e) Whether or not the application of such a license tax to plaintiff violates the Commerce Clause of the Federal Constitution?
>
> (f) Whether or not the license tax or its application to plaintiff violates the due process or equal protection clauses in the State or Federal Constitution?"

After agreeing to withhold criminal proceedings against taxpayer's employees for this license for taxpayer's promise to pay the city the license due, if any, under this paragraph (d), the city demurred to the Bill of Complaint on the ground that since the tax bill attached as an Exhibit to the Bill was addressed to J. C. Penney, therefore, it did not appear that the city claimed of taxpayer any tax under this license notwithstanding allegations to the contrary in the Bill. This demurrer was sustained. The Bill was then amended to allege:

> (1) J. C. Penney Company was not in the photography business and could not owe a license under paragraph (d).

(2) J. C. Penney Company was licensed as a "studio photographer" and could not owe a license under this paragraph under the express terms of the license schedule.

(3) Taxpayer was the real party in interest under the agreement with Penney.

(4) The city knew that taxpayer was the real party in interest, as shown from correspondence attached as exhibits to the Amendment.

(5) Paragraph (d) was adopted by the City to cover taxpayer's (not Penney's) activities.

(6) The naming of Penney in the tax bill was for the purpose of avoiding judicial review of this license.

The re-filed demurrer to the amended Bill was sustained and the suit was dismissed.

In the meanwhile, though taxpayer had been doing business as noted above in seven other cities in Alabama without any effort having been made by the state to impose any state and county privilege license on taxpayer's operations, suddenly the State Department of Revenue made assessments against taxpayer for such license for the then current year, and for escaped licenses for as far back as the State statutes would permit. The result of that effort is found in the related case of **Dunbar-Stanley Studios v. Alabama**, also on appeal to this Court. The conclusion seems inescapable that this action on the part of the State was instigated by the same parties and with the same motive which is behind the action of the city in this case, viz., to eliminate competition from taxpayer in Alabama.

This case was appealed to the Supreme Court of Alabama where it was argued orally before the Division of that Court consisting of Chief Justice Livingston, and

Justices Lawson, Goodwyn and Coleman. However, contrary to the legislative direction contained in Title 13, Code of Ala., Sec. 7, the case was submitted to Supernumerary Circuit Judge B. W. Simmons, who wrote the Opinion in this case, concurred in by the members of the other Division of that Court who had not heard the oral arguments.

Judge Simmons held in the Opinion written by him that since the city had billed J. C. Penney for this license as shown on the Exhibit to the Bill, therefore, taxpayer could not raise the federal questions concerning the constitutionality of this license, regardless of the allegations of the Amended Bill. This was in direct violation of the well established rules of that Court that

(1) On demurrer, the allegations of the Bill of Complaint must be taken as true.

Winston v. Winston, 276 Ala. 303, 306, 161 So. 2d 588 (1964).

(2) In the absence of express agreement of the parties (which was not made in this case), a demurrer is not to be sustained to a Bill for Declaratory Judgment concerning the validity of a city license.

Moore v. City of Fairhope, 275 Ala. 506, 156 So. 2d 366 (1963);

Sperry & Hutchinson v. City of Fairhope, 270 Ala. 582, 120 So. 2d 752 (1960).

V.

THE QUESTIONS ARE SUBSTANTIAL.

At its place of business in Charlotte, North Carolina, taxpayer originated a specialty in taking 5 x 7 baby pictures at .59¢ each. The specialty developed into a nation-

wide business in conjunction with the J. C. Penney Company department stores. Its business is interstate in its nature and scope. It is now and always has collected and remitted local sales taxes where applicable. But the City of Mobile is now standing in the door to exclude taxpayer by requiring a license which had been applied only to taxpayer who is engaged in interstate activity. Furthermore, the license, $50.00 per day, is completely confiscatory. No one could do photography business in Mobile at $50.00 per day. There isn't that much photography business in Mobile. Hence, judicial relief was essential against this discriminatory, confiscatory privilege license on an interstate activity.

Though the City agreed to accept the tax from taxpayer to avoid insistence for an injunction *pendente lite,* when time came to respond to litigation, the city suddenly decided that they never knew taxpayer, they knew only J. C. Penney. The city has assiduously avoided making any defense of this license. Now Supernumerary Circuit Judge Simmons refuses to consider the federal rights of taxpayer sought to be protected here by ignoring well settled rules of procedure to dispose of the case on an alleged local ground by a spurious application of the doctrine of "standing".

Rightly or wrongly it is alleged in the Bill that it is taxpayer who has a controversy with the city about the application of paragraph (d) of the amended city license to taxpayer's activities. The city gave a bill **to taxpayer** for this license, which was addressed to J. C. Penney Company. This does not and cannot mean that therefore the only controversy over the license is with Penney. If the allegations of the Bill are to be believed, taxpayer still has a controversy with the city about this license. It didn't take the tax bill to create a controversy, and its existence does not prevent taxpayer from obtaining a

declaratory judgment if there is a justiciable controversy between taxpayer and city. The mere demand for a license by the license commissioner creates a justiciable controversy.

Brown v. Southern Cigarette Co., 269 Ala. 539, 114 So. 2d 387 (1959). Hence, the addressee of the tax bill was completely irrelevant.

Furthermore, it was taxpayer's employee's liberty jeopardized here, and taxpayer's money involved. This is certainly a controversy and a justiciable one.

Supernumerary Circuit Judge Simmons HELD that

> "Without the presence of Penney Company as a party to this suit, a judgment herein sustaining the validity of the ordinance and its application to Penney Company, would be without binding force on said company."

Since it is alleged in the Bill of Complaint that Penney is licensed by the City as a "studio photographer", and since a "studio photographer" is exempt from the license covered by paragraph (d), and since it is alleged that Penney does not take photographs nor offer photography service, neither the city nor Supernumerary Circuit Judge Simmons can apply this license to Penney much less make it of "binding force on said company," and insofar as we know, no one has attempted to. Hence, Penney is not only not a necessary party in this suit; it is not even a proper party.

All of this permitted the State court to follow the lead of the city and not pass on the validity of this license, even though taxpayer's rights under the Federal Constitution are violated.

1.

Decision on Taxpayer's Rights Under the Federal Constitution Cannot Be Avoided in State Courts by Spurious Application of State Rules.

In **Terre Haute & Indianapolis R. Co. v. Indiana,** 194 U. S. 579, 589 (1904) where the state court construed a state statute in a fashion held to be untenable but thereby avoiding review of the federal constitutional questions invoked, Justice Holmes said for the unanimous court:

> "We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court."

In **Ward v. Love County,** 253 U. S. 17, 22 (1920) this was expanded with language particularly apt in the case at bar:

> "The right to the exemption was a Federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the supreme court, is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support."

In **Davis v. Wechsler,** 263 U. S. 22, 24 (1923) the state court held that a defense of wrong venue was waived under circumstances which did not seem appropriate to

this Court, Justice Holmes added to the ideas stated above:

> "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

This was summed up in **First Nat. Bank v. Anderson**, 269 U. S. 341, 346 (1926):

> "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of Federal law; and where a case coming from a state court presents that question, this court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court."

In **Allied Stores v. Bowers**, 358 U. S. 522, 525 (1959), this Court held that the question presented here (viz., standing to test the constitutionality of a state tax) was for determination by this Court, and this Court was not bound by the state court's holding of no standing by the taxpayer to raise the question.

Accord:

Mitchell v. Clark, 110 U. S. 633, 645 (1884);
Boyd v. Nebraska, 143 U. S. 135, 180 (1892);
Covington & Lexington Turnpike v. Sandford, 164 U. S. 578, 595 (1896);
Carter v. Texas, 177 U. S. 442, 447 (1900);
Lovell v. Griffin, 303 U. S. 444, 450 (1938).

A previous effort by the Supreme Court of Alabama to forestall protection of constitutional rights was thwarted by this Court in:

N. A. A. C. P. v. Alabama, 357 U. S. 449, 454-458 (1958);

N. A. A. C. P. v. Alabama, 377 U. S. 288, 293-302 (1964).

Since it is plainly alleged in the Amended Bill of Complaint:

(1) That taxpayer's employee's liberty was threatened under this license

(2) That taxpayer's money is jeopardized by this license

(3) That the license was imposed to bar taxpayer for engaging in interstate activity in Mobile

taxpayer has standing to raise the question whether or not the license infringes taxpayer's constitutional rights. The decision by the state court that taxpayer cannot raise questions of the constitutionality of this ordinance is not binding on this Court, and this Court should therefore consider whether or not this license can withstand attack under the Federal Constitution.

2.

Licenses Used to Discriminate Against Interstate Commerce Are Invalid Under the Commerce Clause.

The Amended Bill of Complaint alleges that paragraph (d) of the photographer's license in question is aimed at and discriminates against interstate activity consisting of solicitation of orders and subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce. The original city photogarpher's license applied to:

(1) studio photographers at an established place

(2) photographers using animals as a prop.

(3) photographers of pedestrians on the street

(4) all other photographers, defined to be transient photographers.

This license was amended with a catch-all provision, paragraph (d), to cover all other photographers who were not

(a) studio photographers, or

(b) transient or itinerant photographers.

This license was fixed at $50.00 per day, which made it prohibitory. It was further alleged that this paragraph (d) had been applied only to the activities of taxpayer which were interstate activities. Hence, the question arises: can a city impose discriminatory licenses on interstate activity?

Regardless of the right of states or cities to impose non-discriminatory taxes or licenses on interstate activity, as in **Portland Cement Co. v. Minnesota,** 358 U. S. 450 (1959), it was recognized, even in that case, 358 U. S. 458:

> "It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States. Gibbons v. Ogden, 9 Wheat. 1. In keeping therewith a State 'cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose' such as itinerant drummers. Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 493, 494. Moreover, it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce, Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602. Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage

to local business, Memphis Steam Laundry Cleaners, Inc. v. Stone, 342 U. S. 339; Nippert v. Richmond, 327 U. S. 416, or by subjecting interstate commerce to the burden of 'multiple taxation', Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157; J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307. Such impositions have been stricken because the States, under the Commerce Clause are not allowed 'one single-tax worth of direct interference with the free flow of commerce.' Freeman v. Hewitt, 329 U. S. 249, 256."

In **Sprout v. South Bend**, 277 U. S. 163, 171 (1928), Justice Brandeis stated:

"But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

This has been quoted approvingly many times.

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 470 (1931);

Cooney v. Mountain States Telephone, etc., Co., 294 U. S. 384, 393 (1935);

Pacific Telephone, etc., Co. v. Tax Commission, 297 U. S. 403, 414 (1936).

See also:

Portland Cement Co. v. Minn., 358 U. S. 450, 486 (1959), Dissenting Opinion.

Had paragraph (d) expressly provided that it applied exclusively to non-residents engaged in photography in

Mobile, such as taxpayer, thereby imposing a $50.00 a day license on them from which others would be exempt, this would seem to fall under the interdiction of

Mullaney v. Anderson, 342 U. S. 415 (1952).

See also:

Toomer v. Witsell, 334 U. S. 385 (1948).

In **Bethlehem Motors v. Flynt**, 256 U. S. 421 (1921), a privilege license on manufacturers classified according to residence which discriminated against non-residents was held invalid under the Commerce Clause.

Since it is alleged in the Bill in this case that paragraph (d) has been applied only to taxpayer who is engaged in interstate activity, it seems clear that the license is being applied discriminatorily against interstate activity. Since such is constitutionally permissible where the legislature so discriminates, it should also be impermissible when achieved by the administrative officials.

Therefore, the question here is substantial, and should be answered by this Court.

3.

Interstate Commerce Cannot Be Licensed by Cities.

Though paragraph (d) was conceived and created to discriminate, it was also created and is maintained to apply to interstate commerce. In other words, the City has decided to license interstate commerce, notwithstanding T. 37, Code of Ala., sec. 735, and Section 16 of the License Code of Mobile (set out in the Bill of Complaint in this case) which prohibit such.

The unconstitutionality under the Commerce Clause of license on interstate commerce was established in a case by the predecessor of the City, viz., **Leloup v. Port of Mobile**, 127 U. S. 640, 648 (1888), and this uncon-

stitutionality of licenses on interstate commerce applied "even though the same amount of tax should be laid on domestic commerce", **Robbins v. Taxing District**, 120 U. S. 489, 497 (1887). This was expressed in **Crutcher v. Kentucky**, 141 U. S. 47, 58 (1891):

> "We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

The leading case on this today is **Spector Motor Service v. O'Connor**, 340 U. S. 602, 608, 609 (1951), where it was pointed out that even non-discriminatory licenses on interstate commerce are invalid.

Accord:

Barrett v. New York, 232 U. S. 14, 31 (1914);
Memphis Steam Laundry v. Stone, 342 U. S. 389, 392, 393 (1952).

See also:

Lily & Co. v. Sav-on-Drugs, 366 U. S. 276, 278, 279 (1961).

The City of Mobile should be no more successful this time in licensing interstate commerce than it was in 1888. Hence, this case should be reviewed by this Court, and reversed.

4.

The Right of a State to Fractionalize Interstate Activity and License Essential Components Should Be Finally Determined by This Court in This Case.

(1) The decision of the Supreme Court of Alabama on this question is probably wrongfully decided.

This Court held in **Nippert v. Richmond**, 327 U. S. 416, 423 (1946), that interstate activity cannot be fractionalized

and the local solicitation taxed. This is quoted in the Jurisdictional Statement in the case of **Dunbar-Stanley Studios, Inc. v. Alabama,** appealed herewith.

The Supreme Court of Alabama has held in **Dunbar-Stanley Studios v. Alabama,** ... Ala. ..., 210 So. 2d 696 (1968), and in **Family Discount Stamp Co. v. State,** 274 Ala. 322, 148 So. 2d 218 (1962), that interstate activity may be broken down into parts and the parts taxed separately without running afoul of the Commerce Clause.

Therefore, this Court should review this case and decide which of these positions can endure under the Commerce Clause.

(2) **The question should be finally determined.**

Even if it should be held that the Alabama cases cited above are not in conflict with the decisions of this Court, nevertheless the question should be finally disposed of. Unless this Court reviews this question and settles it now it will undoubtedly return time and again for decision. For it is hardly probable that Alabama will not stretch further this doctrine. Furthermore, other States will no doubt follow.

Hence, the question must be answered. We suggest that these cases can best present it.

5.

A Flat Per Diem Admission Privilege License Cannot Be Imposed on Interstate Activity.

When such a license applied to both interstate and intrastate activity, it was held to be invalid in **West Point Grocery Co. v. Opelika,** 354 U. S. 390 (1957), under the Commerce Clause. The license under sub-paragraph (d) of the City Photographer's License has been applied only to interstate activity. *A fortiori* such license is invalid under the Commerce Clause.

We read **Leloup v. Port of Mobile**, 127 U. S. 640, 648 (1888), as so holding, together with the cases set out in the Sections hereof designated 2 and 3.

6.

The Overwhelming Weight of Authorities Hold That Such Privilege Licenses as Are Here Involved Are in Violation of the Commerce Clause.

These licenses on the photography business and its parts have been reviewed by many courts in many states. They have been almost uniformly stricken down. One of the leading cases is **Olan Mills, Inc. v. City of Tallahassee**, ...Fla. ...., 100 So. 2d 164 (1958), **cert. den.** 359 U. S. 924. Most of these cases are collected in **Haden v. Olan Mills, Inc.**, 273 Ala. 129, 135 So. 2d 388 (1961). See also the Note in 7 A. L. R. 2d 416 (1949). The facts in this very case were involved in **Dunbar-Stanley Studios v. Breen**, a copy of the opinion is set out in the Appendix to the Jurisdictional Statement in the accompanying appeal in the case of **Dunbar-Stanley Studios v. Alabama.**

7.

Privilege Licenses Enforceable With Criminal Sanctions Must Satisfy Substantive Due Process.

The Mobile photographer's license provides for enforcement by applying criminal sanctions. The failure to obtain a license where required is a misdemeanor. Hence, the acts done without a license are made crimes. This presents the question of whether or not the provisions of paragraph (d) satisfy the requirements of substantive due process as to vagueness and imprecision.

In **Raley v. Ohio**, 360 U. S. 423, 438 (1959) this Court said:

"A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them."

See also:

Ashton v. Kentucky, 384 U. S. 195, 200 (1966) f. n. 1; Annotation in 16 L. ed. 2d 1231.

Paragraph (d) is not only infected with patent vagueness, it suffers from being a "catch-all" ordinance which has been condemned.

See:

Bates v. Little Rock, 361 U. S. 516, 526 (1960) f. n. 11.

The State cases arriving at the same conclusion are collected in 134 A. L. R. 841.

Paragraph (d) activity under the Mobile photographer's license quoted herein, would also catch paragraph (b) and (c) activity since they are not excluded from (d). Such imprecision in imposing criminal sanctions is what the due process clause prohibits.

Since the paragraph (d) conduct subject to criminal sanctions, is in language so vague and undefined as to afford no fair warning of what conduct might transgress it, the question for review in this case is substantial and should be determined.

8.

A Copy of the Opinion Delivered Upon the Rendering of the Judgment Sought to Be Reviewed Is Attached Hereto as Exhibit A.

9.

A Copy of the Order of the Supreme Court of Alabama Appealed From Is Attached Hereto as Exhibit B.

Respectfully submitted,

J. EDWARD THORNTON,
P. O. Box 23,
Mobile, Alabama 36601,
Attorney for Appellant upon whom Service is to be had.

Of Counsel:

GLEN B. HARDYMON,
KENNEDY, COVINGTON, LOBDELL & HICKMAN,

THORNTON and McGOWIN.

Certificate of Service.

I, J. Edward Thornton, an attorney and member of the Bar of this Court, one of the attorneys of record for Dunbar-Stanley Studios, Inc., a corporation, Appellant herein, certify that I served a copy of the foregoing Jurisdictional Statement on Hon. Fred Collins, Attorney for the City of Mobile, Appellee herein, by depositing the same in a United States mail box, with first class postage prepaid, addressed to him as counsel of record at his post office address on the 5th day of August, 1968.

J. Edward Thornton,
Attorney.

APPENDIX.

EXHIBIT A.

The State of Alabama—Judicial Department.

The Supreme Court of Alabama.

October Term, 1967-68.

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1 Div. 431.

Dunbar-Stanley Studios, Inc., a Corporation,

v.

City of Mobile, a Municipal Corporation.

Appeal from Mobile Circuit Court, In Equity.

Per Curiam.

Appellant complains here that the circuit court of Mobile County, in equity, erred in sustaining appellee's demurrer to an original and amended bill of complaint, seeking a declaratory judgment, and in dismissing the complaint after complainant (appellant) declined further to amend.

It appears that appellee issued a citation to J. C. Penney Company, a non-resident corporation operating a retail store in the City of Mobile, for the sale of merchandise. The citation called upon Penney Company to pay a photographer's privilege license imposed by an ordinance.

J. C. Penney Company is neither a party to this suit, nor does it appear that said company has either agreed or refused to pay the license. There is no contention in

the complaint that appellant has been cited or requested to pay the license. Appellant, in its complaint, challenges the validity of the ordinance and its constitutionality.

We think the complaint adequately shows that Penney Company and appellant entered into a contractual agreement whereby appellant was to perform photographic service for the public in the several Penney Company stores in Alabama (including the one in Mobile), with a division of net profits after deduction of expenses. Appellant is a non-resident corporation with its main office in Charlotte, North Carolina.

Appellant sends a photographer to Alabama to perform skilled service in taking children's photographs. The film, after exposure before its subjects in the Penney Company store, is sent to the North Carolina studio, there to be developed and converted into a finished photograph, which is sent back to Alabama for delivery by Penney Company employees to the customer. No photographer engaged in the service is a resident of Alabama.

It further appears that the Penney Company store in Mobile (as do other Penney Company stores in Alabama) causes certain advertising to be done. This advertising tends to recruit customers for the proposed photographic service. Penney Company takes the orders, which are transmitted to appellant in Charlotte, North Carolina, for approval and acceptance. When the orders are accepted, the finished products are sent to the Penney Company stores for delivery by Penney Company employees to the customer and collection of pecuniary charges for the service and product. Penney Company receives a percentage of the money, so collected, and accounts to appellant for the balance. Penney Company makes accounting reports to appellant and to its home office.

We might add that Penney Company prepares cards notifying its customers of the proposed visit of the photog-

rapher. Penney Company assumes marked responsibility in trying to drum up photographic business from its prospective customers.

Appellant maintains no office, developing laboratory, or permanent agent in Alabama. The service, exposing the film before the subject child, is performed in Alabama (Mobile) with appellant's equipment that is temporarily located in Alabama. The laboratory equipment for developing the film is all located in North Carolina. With the exception of the laboratory work, preparing announcement cards, exposing the films, all the work incident to the photographic service is performed by Penney Company employees. The photographer takes no orders for the pictures.

Some of the above details may not appear in the complaint at issue, but the modus operandi is set forth in **Dunbar-Stanley Studios, Inc. v. State of Alabama**, 3 Div. 278, Ala. Sup. [MS], recently decided by this court. We think the above statement of facts fairly presents appellant's operations in Mobile.

There are two questions presented by appellant's assignments of error. (1) Did the trial court err in sustaining respondent's demurrer to the complaint, as amended? (2) Did the trial court err in dismissing the complaint, as amended?

We think the justiciability vel non of the complaint, raised by demurrer, falls within the purview of **Southern Ry. Co. v. Curry**, 239 Ala. 263, 194 So. 523, wherein it appears that the appellant (in that case) filed its bill, in equity, against the State Tax Commission seeking a declaratory judgment as to whether the sale of slag, in carload lots, was subject to the provisions of the Sales Tax Act. We observed as follows:

> "But whether it (the slag) is or not (building material), the seller seems to be making no complaint,

and the purchaser not being the taxpayer, eo nomine, is in no position to have that question determined for the person against whom the tax is levied, and a judgment, assuming that the court had jurisdiction to render same, declaratory or otherwise, as between the Railroad Company and the State or its taxing authorities, would be without binding force as between the State and its authorities and the Woodstock Slag Corporation. Section 6, Declaratory Act, Gen. Acts 1935, p. 778. See, also, State Tax Commission et al. v. Commercial Realty Co., 236 Ala. 358, 182 So. 31."

In the instant case, J. C. Penney Company, which was cited for payment of the license tax, is making no complaint. There is no assurance or indication that Penney Company will complain or resist the citation. The judicial doors are wide open for Penney to enter and litigate the legality and constitutionality of the ordinance that purports to impose the privilege license tax here in question. Penney cannot do so by proxy, as here undertaken.

Without the presence of Penney Company as a party to this suit, a judgment herein sustaining the validity of the ordinance and its application to Penney Company, would be without binding force on said company. The mere fact that appellant has entered into a contract to reimburse Penney Company for any license tax it may have to pay appellee, does not make appellant a taxpayer eo nomine, or give it a status that entitles it to challenge the validity and constitutionality of the ordinance. The contract for such reimbursement is a private arrangement between appellant and Penney Company that is of no concern to appellee. The appellee is interested in collecting the tax from Penney Company. Any declaratory judgment in the instant suit, if the ordinance should be sustained, would not legally effect such collection. The City

could not legally collect Penney Company's tax from appellant. It would still have to look to Penney Company for payment.

Some of the vital and material allegations of the complaint, as amended, stem from conclusions and conjectures. Such dependency could have been avoided had Penney Company been joined as a party. The trial court, with all the parties before it, could have decreed complete justice, binding on all the parties, thus obviating piecemeal or fragmentary justice.

We have carefully read the allegations of the original bill, and the amendment thereto. We have given appellant's brief careful study. We conclude therefrom that no justiciable controversy is presented between appellant and appellee. This is true irrespective of astute, diligent and conscientious efforts of appellant, acting through their capable and learned counsel, to inject such controversy.

The decree of the trial court sustaining the demurrer and dismissing the bill is affirmed.

The foregoing opinion was prepared by B. W. Simmons, Supernumerary Circuit Judge, and was adopted by the court as its opinion.

Affirmed.

Livingston, C. J., and Simpson, Coleman and Kohn, JJ., concur.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 13 day of June, 1968.

J. O. Sentell,
Clerk Supreme Court of Alabama.

EXHIBIT B.

June 13, 1968.

The State of Alabama—Judicial Department.

The Supreme Court of Alabama.

October Term 1967-68.

1st Div. 431.

Dunbar-Stanley Studios, Inc.,

v.

City of Mobile,
a Municipal Corporation.

Appeal from Mobile Circuit Court, In Equity.

Come the parties by attorneys, and the record and matters therein assigned for errors being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

It Is Therefore Ordered, Adjudged and Decreed that the decree of the Circuit Court be in all things affirmed.

It Is Further Ordered, Adjudged and Decreed that the appellant, Dunbar-Stanley Studios, Inc., a Corporation, and The Travelers Indemnity Company, sureties for the costs of appeal, pay the costs of appeal in this Court and in the Court below, for which costs let execution issue.

SUPREME COURT, U. S.

FILED
AUG 30 [illegible]
JOHN F. DAVIS

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. [redacted] 377

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

vs.

CITY OF MOBILE,
Appellee.

MOTION TO DISMISS.

BARRY HESS,
919 Dauphin Street,
Mobile, Alabama 36604,
Attorney for Appellee.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. .....

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

vs.

CITY OF MOBILE,
Appellee.

MOTION TO DISMISS.

Appellee, City of Mobile, a Municipal Corporation, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the attempted appeal from the order of the Supreme Court of Alabama entering a judgment in affirmance of the decree of the Mobile Circuit Court be dismissed, on the grounds that the United States Supreme Court will decline to review State Court judgments which rest on independent and adequate State

grounds, despite the possible co-presence of federal grounds, or in the alternative that the appeal in this case be dismissed on the ground that there is no basis for federal jurisdiction, and on the ground that the appeal in this case be dismissed for that the rule of this Court, Revised Rule No. 15 (d) has not been complied with sufficiently to support the assertion that the ruling of the State Court was of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court.

OPINION.

This is a direct appeal from an order entered on June 13, 1968, by the Supreme Court of Alabama affirming the decree of the Mobile Circuit Court which had sustained the demurrer of the Appellee and dismissed the Bill of the Appellant herein, Dunbar-Stanley Studios, Inc., which sought to have considered in a declaratory judgment proceeding the citation of J. C. Penney Company to pay a photographer's privilege license imposed by an ordinance. The opinion of the Supreme Court of Alabama is appended to Appellant's jurisdictional statement and is now reported in 211 So. 2d 803.

The Per Curiam opinion of the Alabama Supreme Court concluded that the Bill of Complaint of the Appellant failed to show on its face a "justiciable controversy" and therefore failed to confer jurisdiction on the trial court to consider the action, due to the failure of the Appellant to join an indispensable party in the action. The Alabama Court cited Southern Railway Company v. Curry, 239 Ala. 263, 194 So. 523, as the basis for its decision that a declaratory judgment to determine the validity of a privilege license imposed on a third party must have, as an indispensable party, the third party taxpayer against whom the license has actually been imposed.

STATEMENT OF THE CASE.

This was a suit filed in the Circuit Court of Mobile County, Alabama, for declaratory judgment, by Appellant, not a taxpayer or licensee of the City of Mobile, against the City of Mobile, to determine the validity of a recently amended City "Photographers" license ordinance. The City's demurrer to the bill was sustained. After amendment to the Bill, the City filed its amended demurrer which was sustained, and the bill was dismissed, after the Appellant declined further to amend.

On appeal by the Appellant to the Supreme Court of Alabama, the decree of the Circuit Court was affirmed, and the Appellant seeks to have this judgment reviewed on this appeal.

STATEMENTS OF FACTS.

THERE ARE NO FACTS IN THIS CASE.

The effect of the demurrer of the Appellee is to test the sufficiency of the allegations of the Appellant's complaint in fulfilling the State substantive and procedural requirements called for by statute and case law as necessary to enable the Appellant to proceed with a declaratory judgment action. The allegations in the Bill of Complaint, and amendment are taken as true. (Unless the facts in the bill are in conflict, in which case the court may take its choice, or may sustain a demurrer for vagueness; furthermore, facts in exhibits rule over facts alleged in the bill if the two sets of facts are in conflict.) The Appellant in its jurisdictional statement has alleged many "facts" which Appellant apparently did not see fit to put in the Bill of Complaint. These additional extraneous "facts" were not considered by the trial court or the Alabama Supreme Court when determining the sufficiency of the bill on demurrer.

As read by the Alabama Court, the Appellant's complaint shows that the Appellee, City of Mobile, issued a citation to J. C. Penney Company, a non-resident corporation operating a retail store in the City of Mobile for the sale of merchandise. The citation called upon Penney Company to pay a Photographer's privilege license imposed by an ordinance. Penney Company had prior to this citation been paying to the City an amount called for from one qualifying as a "studio photographer". The Bill does not allege that Penney qualified as a "studio photographer" although paying for a license as such. Upon amendment of the licensing ordinance of the City covering "Photographers" the citation referred to was served upon Penney, seeking compliance with that portion of the ordinance as amended under which the activities of the Penney Company on its premises were deemed by the City to qualify, i. e., furnishing "photographic services".

J. C. Penney Company was neither made a party to this suit nor does it appear that said company has either agreed or refused to pay the license. There is no contention in the Appellant's Bill of Complaint that Appellant has been cited or requested to pay the license. Despite this alleged state of facts, Appellant, in its complaint challenges the validity of the ordinance and its constitutionality as applied to Appellant. The further allegations of the bill concerning the operations of Penney Company in furnishing "photographic service", and the Appellant in furnishing a camera, operator and film processing, are summarized by the Alabama Supreme Court as follows:

> "We think the complaint adequately shows that Penney Company and appellant entered into a contractual agreement whereby appellant was to perform photographic service for the public in the several Penney Company stores in Alabama (including the one in Mobile), with a division of net profits after deduction of expenses. Appellant is a non-

resident corporation with its main office in Charlotte, North Carolina.

"Appellant sends a photographer to Alabama to perform skilled service in taking children's photographs. The film, after exposure before its subjects in the Penney Company store, is sent to the North Carolina studio, there to be developed and converted into a finished photograph, which is sent back to Alabama for delivery by Penney Company employees to the customer. No photographer engaged in the service is a resident of Alabama.

"It further appears that the Penney Company store in Mobile (as do other Penney Company stores in Alabama) causes certain advertising to be done. This advertising tends to recruit customers for the proposed photographic service. Penney Company takes the orders, which are transmitted to appellant in Charlotte, North Carolina, for approval and acceptance. When the orders are accepted, the finished products are sent to the Penney Company stores for delivery by Penney Company employees to the customer and collection of pecuniary charges for the service and product. Penney Company receives a percentage of the money, so collected, and accounts to appellant for the balance. Penney Company makes accounting reports to appellant and to its home office.

"We might add that Penney Company prepares cards notifying its customers of the proposed visit of the photographer. Penney Company assumes marked responsibility in trying to drum up photographic business from its prospective customers.

"Appellant maintains no office, developing laboratory, or permanent agent in Alabama. The service, exposing the film before the subject child, is performed in Alabama (Mobile) with appellant's equipment that is temporarily located in Alabama. The laboratory equipment for developing the film is all

located in North Carolina. With the exception of the laboratory work, preparing announcement cards, exposing the films, all the work incident to the photographic service is performed by Penney Company employees. The photographer takes no orders for the pictures."

In short, Penney Company provides the premises, with all that entails, and the entire facilities, except as noted above by the Court, in providing the "photographic service" for which the City, appellee, sought to require a license fee, from Penney Company.

JURISDICTION.

Jurisdiction for this appeal is sought to be found under 28 U. S. C., Sec. 1257 (2).

Appendix, Exhibit A of Appellant's jurisdictional statement sets out the opinion of the Alabama Supreme Court. Appellee can find no statement in the opinion which indicates a consideration of the validity of a state (municipal) statute on the ground that it is repugnant to the constitution, treaties or laws of the United States. A *fortiori* Appellee can find nothing in the decision of the Supreme Court of Alabama which appears to be a decision in favor of the validity of the state (municipal) statute contended to be repugnant to the constitution, treaties or laws of the United States.

Therefore, there is no jurisdiction for this appeal to be found under 28 U. S. C., Sec. 1257 (2).

Jurisdiction for this appeal is not contended for, nor is jurisdiction found, in 28 U. S. C., Sec. 1257 (1) concerning the question of the validity of a treaty or statute of the United States as no such treaty or statute is alleged to be involved.

Therefore, there is no jurisdiction for **appeal** to the United States Supreme Court in this case by appellant on statutory authority.

There is no jurisdiction by writ of certiorari because the judgment rests on an independent and adequate non-federal ground.

Johnson v. New Jersey, 384 U. S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966);

Newman v. Gates, 204 U. S. 89, 51 L. Ed. 385, 27 S. Ct. 220 (1906);

John v. Paullin, 231 U. S. 585, 58 L. Ed. 383, 34 S. Ct. 179.

The independent and adequate state ground for the decision of the Alabama Supreme Court is shown in the opinion of that Court, Appellant's jurisdictional statement, Appendix, Exhibit A. Certainly the opinion of the Alabama Court shows the Court to be following its own precedent, Southern Railway Company v. Curry, 239 Ala. 263, 194 So. 523, in a closely analogous case. Both in the instant case and in Southern v. Curry, *supra;* the aim sought is that "The trial court with all the parties before it, could have decreed complete justice, binding on all the parties, this obviating piece meal or fragmentary justice", to quote the court in the instant case.

In the appendix to this motion; Exhibit A, is a brief of supporting authorities showing the statutory and case law of Alabama requiring that parties with an interest in the determination sought to be resolved by a declaratory judgment action be made parties as a substantive requirement of jurisdiction of the trial court in the suit. Primarily, the brief is included to show the substantial and adequate non-federal basis for the decision of the Alabama Court. Parenthetically, Judge Simmons has ex parte mentioned that the appended brief was followed in writing the opinion of the Alabama Court.

The Rule of this Court concerning Jurisdictional Statements, Rule 15 (d), requires the jurisdictional statement by Appellant to specify "the way in which they (the federal questions) were passed upon by the Court (State Court) with such pertinent quotations of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears (. . .) as will support the assertion that the rulings of the Court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court" (Parenthesis added).

Appellee can find no compliance with these requirements in the jurisdictional statement of the Appellant.

Without specific references to the place in the record where the matter appears, on page 12 of Appellant's Jurisdictional statement is a "summary" of the holding of the Alabama Court. Appellant "summarizes" that, as Appellee "had billed J. C. Penney for this license, as shown on the Exhibit to the bill, therefore, taxpayer could not raise the federal questions concerning the constitutionality of this license regardless of the allegations of the Amended Bill". Appellee cannot find such a "holding" in the Alabama Court opinion. Rather, it seems possible that if Appellant had joined J. C. Penney Company in the action, Appellant would have had the opportunity of attempting to prove its allegations no matter how contradictory, conflicting or fictitious the allegations may be. Instead, the Appellant refused to amend further and suffered a dismissal of the cause in order that it might appeal.

Similarly, without specific references, Page 14 of the Appellant's Jurisdictional Statement alludes to a part of the Alabama Court's **reasoning** as a "holding" of that Court. If nothing else, Page 14 shows Appellant is painfully aware that the Alabama Court sustained the demurrer on the ground that an indispensable party was not made a party to the action, as shown by Ap-

pellant's Bill of Complaint, thereby depriving the trial court of jurisdiction in the matter.

Further, without references to the record or opinion, Appellant's Jurisdictional Statement refers on Pages 7, 13 and 16 to a state court holding of "no standing" and on Page 17 to a holding by the state court that "taxpayer cannot raise questions of the constitutionality of this ordinance". Appellee has been unable to find any such holdings in the Alabama Court opinion. Rather, the only holding seems to be that to have "standing", and be able to "raise questions" the Appellant must bring in the indispensable party alleged by Appellant in Bill and exhibit to have been actually cited for an amount due under the ordinance in question. Certainly this is an independent and adequate as well as an equitable basis for the State Court judgment.

There is no jurisdiction or good cause for granting a writ of certiorari in this Court.

AUTHORITIES.

A copy of the Brief submitted by Appellee on appeal of this cause to the Alabama Supreme Court is attached hereto as Exhibit A to show specific authority applicable to this case.

A late Review of Actions under the Alabama Declaratory Judgment statutes can be found in **The Alabama Lawyer**, Vol. 29, No. 3, July, 1968, page 344. See especially pages 346 and 349—Justiciable Controversy and Parties.

Respectfully submitted,

BARRY HESS,
919 Dauphin Street,
Mobile, Alabama 36604,
Attorney for Appellee.

EXHIBIT A.

IN THE

SUPREME COURT OF ALABAMA.

OCTOBER TERM 1966-67.

FIRST DIVISION NO. 431.

DUNBAR STANLEY STUDIOS, INC.,
Appellant,

vs.

CITY OF MOBILE, a Municipal Corporation,
Appellee.

BRIEF AND ARGUMENT OF APPELLEE.

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PROPOSITIONS OF LAW.

Proposition of Law No. 1.

Bill for Declaratory Decree is subject to demurrer for failure to show that complainant has a justiciable interest in the subject matter.

Shadix v. City of Birmingham, 251 Ala. 610, 38 So. 2d 851 (1949);
American Federation of State C & M Emp. v. Dawkins, 268 Ala. 13, 104 So. 2d 827 (1958);
Southern Railway Company v. Curry, 239 Ala. 263, 194 So. 523;
Town of Warrior v. Blaylock, 275 Ala. 113, 152 So. 2d 661 (1963);
Werneth v. Hanly, 262 Ala. 219, 78 So. 2d 299, 302 (1955);
Birmingham Trust National Bank v. Garth, 263 Ala. 121, 81 So. 2d 590 (1955);
Curjel v. Ash, 261 Ala. 42, 72 So. 2d 732 (1954).

Proposition of Law No. 2.

There is no justiciable controversy in the present case, because the Court will not make a declaration in a declaratory judgment proceeding which will be futile.

Homan v. Beard, 268 Ala. 22, 104 So. 2d 914 (1958);
City of Mobile v. Scott, 278 Ala. 388, 178 So. 2d 545 (1965).

Proposition of Law No. 3.

In an action for declaratory judgment, the presence of necessary parties is jurisdictional, and the Court will not maintain and render decrees where the questions pre-

sented cannot be adjudicated for want of necessary parties.

Holland v. Flynn, 239 Ala. 390, 195 So. 265 (1940);

City of Mobile v. Gulf Development Company, 277 Ala. 431, 171 So. 2d 247 (1965);

Alabama Farm Bureau, Mut. Cas. Ins. Co. v. Crestman, 277 Ala. 410, 171 So. 2d 119 (1965);

Title 7, Section 166, Code of Alabama, 1940 (Recompiled 1958);

Title 7, Section 128, Code of Alabama, 1940 (Recompiled 1958).

ARGUMENT.

* * * * * * *

Proposition of Law No. 1.

A bill for declaratory decree is subject to demurrer for failure to show that complainant has a justiciable interest in the subject matter. Directly concerning this proposition, this Court has stated in **Shadix v. City of Birmingham**, 251 Ala. 610, 38 So. 2d 851 (1949), as follows:

> "The rule prevailing in this jurisdiction, as well as elsewhere, is that **there must be a bona fide existing controversy of a justiciable character to confer upon the court jurisdiction to grant declaratory relief** under declaratory judgment statutes. Jefferson County v. Johnston, 232 Ala. 406, 168 So. 450; Hawkins v. Jefferson County, 233 Ala. 49, 169 So. 720; Bagwell v. Woodward Iron Co., 236 Ala. 668, 184 So. 692; Theater Co. v. Manning, 236 Ala. 670, 185 So. 171; Saenger Theaters Corp. v. McDermott, 237 Ala. 489, 187 So. 460; Bates v. Baumhauer, 239 Ala. 255, 194 So. 520; Bullock County v. Sherlock, 242 Ala. 262, 5 So. 2d 800.
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> **It is not sufficient to plead by way of conclusion that there is an existing controversy of a justiciable character between the parties. Facts must be pleaded out of which the controversy arises.** City of Cherryvale v. Wilson, 153 Kan. 505, 112 P. 2d 111; Anderson v. Wyoming Development Co., 60 Wyo. 417, 154 P. 2d 318.
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> Although ordinances are expressly declared to be proper subjects of declaratory relief, yet a declaratory judgment may not be rendered in respect to them in disregard of the statutory limitations upon the granting of such relief . . .
>
> * * * * * * *

The declaratory judgment statutes do not empower Courts to decide moot questions, abstract propositions or to give advisory opinions, however convenient it might be to have the questions decided for the government of future cases (Cases cited). While there may be a difference of opinion as to the validity of the ordinance in question, there is no present clash of contending rights.

Our judgment is that the averments of the petition fall far short of presenting an actual bona fide justiciable controversy between the parties. The demurrer to the petition was well taken and was properly sustained." (Emphasis added.)

This Court, in **Shadix**, supra, after setting out the petition which was designed to show a justiciable controversy stated "we are of the opinion that the averments of the petition are totally insufficient to justify resort to litigation looking to a declaratory judgment. **The facts do not show any present controversy between the petitioner and the City of Birmingham.**" (Emphasis added.) THAT IS THE EXACT VIEW OF THE TRIAL COURT IN OUR CASE.

It is abundantly clear from the Bill of Complaint, both before and after amendment, that the City of Mobile cited a company by the name of J. C. Penney Company, a local retailer, to pay a privilege license according to the provisions of the City License Code (Tr. 1, Para. 4) (Tr. 8, Exhibit B).

While there are also to be found in the bill of complaint and the bill of complaint as amended, conclusionary statements to the effect that the license requirements applied only to the activities of the complainant, there is not to be found a single fact pleaded, as required in **Shadix**, supra, out of which the controversy supposedly arises with the City of Mobile. This court has dealt directly with

this type of conclusionary allegation in American Federation of State, C & M Emp. v. Dawkins, 268 Ala. 13, 104 So. 2d 827 (1958), where this court stated:

> "Without specifying the facts amounting to a controversy, this Court cannot proceed to declare a justiciable controversy upon a bare showing in a complaint of mere apprehension, anticipation, or fear of unauthorized, illegal, or unconstitutional acts, by public officers to be committed in future. O'Rear v. Sartain, 193 Ala. 275, 69 So. 554; Alston v. Dunn, 176 Ala. 421, 58 So. 300; Goodson v. Dean, 173 Ala. 301, 55 So. 1010."

Even if the privilege license levied on J. C. Penney Company is unconstitutional and invalid, what party in the instant action can question the validity?

There is not an allegation to be found in the complaint or the complaint as amended, that J. C. Penney Company is contending that they ought not to pay the privilege license, therefore, there is no allegation of a justiciable controversy between the parties to this suit, or even between those that are parties to this suit and those that are not parties to this suit.

For the sake of the instant case, and argument, we could submit that all the plaintiff's activities are in interstate commerce, and there would still be no justiciable controversy between the parties to this suit.

For aught that appears in the bill of complaint, J. C. Penney Company may be willingly paying the privilege license shown by the bill of complaint to have been levied upon it. Can the "interstate trader" object to that, because of a contract such as alleged, between private parties, concerning operations inside J. C. Penney Company's store?

Can it be contended that a local retailer may contract for another, possibly a supplier entirely in interstate

trade, to pay the local retailer's taxes or licenses and thereby, ipso facto, make the tax or license, because of a third party contract, a tax on the third party and consequently subject to the various ramifications of taxation applicable only to the third party and not to the local retailer? Is the City's legislative power to be bound by a court to the terms of a contract entered into by a city retailer and a third party? Certainly not! Not even if the third party and the City retailer were both parties, much less where the City retailer is left out entirely as a party, once the third party has a contract signed and is operating some segment of the retailer's instore operation. For aught that appears, J. C. Penney Company understands that this could not be reasonably contended, and does not care to tilt at windmills.

It is difficult to imagine a privilege license that could not fall before the restriction on burdening interstate commerce if each local retailer, by a contract with an interstate supplier to pay the retailer's privilege taxes, could bind the City to whatever restrictions on taxation can be shown to apply to the interstate supplier.

Previously in the deliberations of this Court on declaratory judgments, a similar bill for declaratory judgment was considered in **Southern Railway Company v. Curry**, 239 Ala. 263, 194 So. 523. In the **Southern** case, the Railway Company brought a bill for declaratory judgment against members of the State Tax Commission to determine whether a sale of slag in carload lots was subject to the provisions of the retail sales tax. The seller of the slag, Woodstock Slag Corporation, was not a party to the bill, and had apparently willingly paid the sales tax. This Court disposed of the supposed issue of whether the slag was or was not a "building material" as follows:

> "But whether it is or not, the seller seems to be making no complaint, and the purchaser not being

the taxpayer, eo nomine, **is no position to have that question determined for the person against whom the tax is levied,** and a judgment, assuming that the Court had jurisdiction to render same, declaratory or otherwise, as between the Railway Company, and the State or its taxing authorities would be without binding force as between the State and its authorities and the Woodstock Slag Corporation. Section 6, Declaratory Act, Gen. Acts, 1935, P. 778. See also, State Tax Commission et al. v. Commercial Realty Company, 236 Ala. 358, 182 So. 31.

The facts alleged in the bill do not show a justiciable controversy and are not sufficient to give it equity.

The averments of a bill to warrant relief must be so complete that on their admission or on decree pro confesso the Court can without evidence say that the complainant is entitled to the relief prayed (Cases cited)." (Emphasis added.)

The trial court in the instant case could see no equity in the bill where, if all the relief prayed for were granted, there would be no judgment of binding force as between the City and J. C. Penney Company, the licensed retailer in this case.

The various other recent cases cited under Proposition 1 show instances of demurrers to bill for declaratory judgments held good because of failure of the bill to show an actual controversy as to a justiciable question. We will not burden the Court with a review of the facts for the holding of each. There are numerous others so holding.

Applying the above argument to the complaint, and the complaint as amended, it is obvious that the bill of complaint, and the bill of complaint as amended, was demurrable. The first ground of the Appellee's demurrer (Tr. 14, Tr. 21) as well as the numerous other grounds

therein are addressed directly to this point. There was no error in sustaining Appellee's demurrer to the Appellant's complaint as amended, and to the original bill of complaint.

Proposition of Law No. 2

There is no justiciable controversy in the instant case, because this Court will not make a declaration in a declaratory judgment proceeding which will be futile. An election which occurred pending the decision in **Homan v. Beard**, 268 Ala. 222, 104 So. 2d 914 (1958), and a release from employment in **City of Mobile v. Scott**, 278 Ala. 388, 178 So. 2d 545 (1965), were the basis for this Court stating that there was no justiciable controversy, since it would be futile to make a declaration. The argument under Proposition of Law No. 1 applies fully as well under Proposition of Law No. 2, to show the futility of any declaration in the instant case. Without a possibility of making a judgment binding on the only party alleged to have been cited to meet the requirements of the privilege license involved, a declaration of this Court would be futile.

Proposition of Law No. 3.

In **Holland v. Flynn**, 239 Ala. 390, 195 So. 265 (1940), this Court stated:

> "We deem it our duty to determine whether the Court below acquired jurisdiction to adjudicate the question of title—to make any effective declaration."

In the **Holland** case, where the parties to the suit did not raise the question of absent necessary parties, this Court continued as follows:

> "The Declaratory Judgment Acts (now Title 7, Section 166), required necessary parties to be brought

in. Regardless of this statute, the presence of necessary parties is jurisdictional."

"No matter what may be the wishes of the parties in Court, the Courts will not entertain and render decrees, which, for want of necessary parties, cannot adjudicate the questions presented. This rule has been declared by many courts in cases under the Declaratory Judgment Law. Authorities Cited."

The Section referred to, now Title 7, Section 166, Code of Alabama, 1940 (Recompiled 1958), is as follows:

Section 166—Parties when declaratory relief is sought.—All persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard (1935, p. 777).

In the instant case this cited section would be applied in conjunction with Title 7,

Section 161—When Refusal Proper.—The Court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy, giving rise to the proceeding (1935, p. 777).

This Court has repeatedly ruled that even where no specific ground of demurrer used the phrase "necessary party" or "indispensable party", a declaratory judgment would not be rendered where the above statutes and

equities of the case had not been complied with in the averments of the bill.

In **City of Mobile v. Gulf Development Company**, 277 Ala. 431, 171 So. 2d 247 (1965) this Court held that the cause must be reversed for want of necessary parties, although in the action the demurrer of the respondents did not raise this particular issue as to the property owners involved. This Court set out the following principles:

> "The general rule in a court of equity is that all persons having a material interest, legal or equitable, in the subject matter of a suit, must be made parties, either as plaintiffs or defendants. The rule proceeds on the principle that no man's rights should be controverted in a court of justice unless he has full opportunity to appear and vindicate them; and further, that complete justice may be done and future litigation avoided, the performance of the decree being safe, because of the presence in court of all parties who have an interest in its subject matter. The general rule further is that if a bill is defective for the want of proper parties, advantage should be taken of the defect by plea, demurrer, or answer, and if not so taken, the objection is waived. The rule is subject to the exception that if a cause cannot be properly disposed of, on the merits, without the presence of the absent parties, the objection may be taken by the Court ex mero motu. Prout v. Hoge, 57 Ala. 28. See also: Batre v. Auze's Heirs, 5 Ala. 173; McMaken v. McMaken, 18 Ala. 576; Woodward v. Wood, 19 Ala. 213; McCully v. Chapman, 58 Ala. 325; Watson v. Oates, 58 Ala. 647; Amann v. Burke, 237 Ala. 380, 186 So. 769; Matthews v. Matthews, 247 Ala. 472, 25 So. 2d 259; Garrison v. Kelly, 257 Ala. 105, 57 So. 2d 345." Rollan v. Posey, 271 Ala. 640, 645, 126 So. 2d 464, 468.

"The Declaratory Judgment Act, Michie's Sup. Code, § 7811 (11) required necessary parties to be brought in. Regardless of this statute the presence of necessary parties is jurisdictional.

"No matter what may be the wishes of the parties in court the courts will not entertain and render decrees, which, for want of necessary parties, cannot adjudicate the questions presented. This rule has been declared by many courts in cases under the Declaratory Judgment Law. (Authorities Cited), Holland v. Flinn, 239 Ala. 390, 392, 195 So. 256."

See also, for example, **American Farm Bureau v. Crestman**, 277 Ala. 410, 171 So. 2d 119 (1965), reversed for want of necessary party, on the same identical principles, though the issue was never raised in the lower Court in any manner.

Applying the above argument to the bill of complaint, and to the bill of complaint, as amended, it is obvious that both are demurrable. The question presented, concerning the validity of the license levied upon J. C. Penney Company, cannot be adjudicated without the presence of J. C. Penney Company, a stranger to the suit. This Court has taken upon itself the duty of determining this issue in declaratory judgment actions; the instant case is a specific example of when such action is a necessity. There was no error in sustaining the Appellee's demurrer to the Appellant's Bill of Complaint as amended, and to the Appellant's Bill of Complaint as originally filed. Nor was there error in rendering a final decree dismissing the Bill of Complaint as amended. There is no error in the record.

Respectfully submitted,

WILLIAM H. BRIGHAM,
Attorney for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 377.

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

versus

CITY OF MOBILE,
Appellee.

BRIEF

In Opposition to Motion to Dismiss or Affirm on Behalf of Appellant.

I.

We redirect attention to the fact that though the City has been given another opportunity to set forth the economic, political or sociological justification of the license sought to be imposed here, not one word has been written to indicate

(1) that Dunbar Stanley was not the sole object of this confiscatory, catch-all, privilege license, and

(2) that this license was not adopted to exclude Dunbar Stanley from doing business in Mobile.

Instead, the sole response here is that Dunbar Stanley's constitutional rights must be sacrificed on the procedural requirements as to "standing". In the absence of any explanation of this license, the inference is overpowering, that it was conceived and born in iniquitous discrimination. And this is positively alleged in the Bill.

The crucial question here is, can a city use its licensing power to exclude out-of-state competition? This is what has been achieved in this case. The Federal Constitution was adopted to prevent this.

II.

It was alleged in the Original Bill of Complaint in this case:

> "4. On, to-wit, the 12th day of October, 1965, the License Department of Defendant issued a citation to J. C. Penney Company for the operations of plaintiff in the City of Mobile on the premises of J. C. Penney Company under such Ordinance, a copy of the citation is attached hereto marked Exhibit B, and by reference made a part hereof.
>
> 5. The remedy provided by the hereinabove described Amended Section of the License Code, and Sections 19, 20 and 25, thereof, make operation without a license a crime and upon conviction therefor, provide punishment by fine up to $100.00 and also imprisonment up to six months.
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> 6. This is the remedy now used by defendant to collect licenses, including the license issued under the Amended Photographer's License and defendant has threatened that unless this citation is paid, this remedy will be used in this case, and one or more agents, servants or employees of plaintiff will be arrested and prosecuted to enforce the citation attached hereto as an exhibit.

7. The amendment of the License Code of this City adopted on August 31, 1965, relating to photographers, hereinabove set out, was made for the purpose of expanding said Section to apply specifically to the operations of plaintiff in this City, and to no one else, by adding subsection d thereto.

8. This Amended Section has been applied, only to the operations of plaintiff in the City of Mobile, and to no one else.

9. This plaintiff has been and is now engaged exclusively in interstate commerce for which it is not now liable to defendant for the license for which the citation was issued or for any other license, * * *.

* * * * * * *

E. (9) J. C. Penney Company has not now nor at any time involved in this suit, any photographic equipment or photographers in the City of Mobile or the State of Alabama. It does not offer any photographic service for compensation or otherwise in the City of Mobile, except that of plaintiff."

Insofar as we can find, this is the only case in Alabama where the Court has not held that on demurrer the allegations of the Bill of Complaint must be taken as true.

See **Winston v. Winston**, 276 Ala. 303, 306, 161 So. 2d 588 (1964) cited on page 12 in the Jurisdictional Statement.

Instead, the Alabama Court held that on these allegations J. C. Penney Company was liable for this license, and not being joined in this proceeding [which included an application for an injunction which was abandoned when the City Commission agreed with Dunbar Stanley to withhold prosecutions under this license upon Dunbar Stanley's promise to pay Dunbar Stanley's money for this license in the event the courts ultimately held this license con-

stitutionally valid]. Dunbar Stanley had no standing to raise the constitutionality of the license.

Thereupon, the Bill of Complaint was amended to allege:

> "14. The privilege license sought to be imposed in this case applies to:
>
> > 'photographers, or persons, firms or corporations taking photographs or offering photography service for compensation * * *.'
>
> J. C. Penney Company is not a 'photographer' nor is it a corporation 'taking photographs' nor does it offer 'photography service for compensation.' Therefore, any citation issued to J. C. Penney Company under the photographer's license is a mistake and an error for J. C. Penney Company has done no act nor has any act been done by, for, or on its behalf which would make said Ordinance applicable to J. C. Penney Company.
>
> (b) This Plaintiff, engaged in interstate commerce as set out above, has offered photography service for compensation at Springdale Plaza on the premises of J. C. Penney Company. Therefore, the citation for the photographer's license attached to the Bill of Complaint, if it should have been issued, should have been issued to this Plaintiff, and not to J. C. Penney Company.
>
> (c) Under the Agreement between Plaintiff and J. C. Penney Company, set out above, any licenses required for the offering of photography service must be obtained by Plaintiff and not by J. C. Penney Company, and any license required of J. C. Penney Company must be paid for by Plaintiff, and Plaintiff must indemnify J. C. Penney Company for any loss or liability for any such license. Therefore, Plaintiff is the real party in interest in any litigation con-

cerning the photographer's license for the photography services described herein.

(d) Prior to the amendment of the photographer's license of the City of Mobile by adding paragraph (d) thereto, the City of Mobile demanded that Plaintiff obtain a license as a Transient Photographer during the year 1963, and as a result thereof, Plaintiff obtained such license. It became apparent that Plaintiff was not a Transient Photographer, and therefore, was not liable for that license. Whereupon, a request for refund for Plaintiff was made, and it was recommended that J. C. Penney Company obtain a license for a studio photographer, all as set out in a letter to the City, a copy of which is attached hereto marked Exhibit D, and by reference made a part hereof.

The City accepted this offer and refunded the amount of the photographer's license to Plaintiff and accepted in place thereof the annual license on J. C. Penney Company as a matter of compromise and settlement, all as shown in a letter from the Mayor, a copy of which is attached hereto marked Exhibit E, and by reference made a part hereof.

Thereafter, the license was amended to add paragraph (d) for the express purpose of including Plaintiff's activities within the coverage of the license.

Notwithstanding the fact that J. C. Penney Company has now and since 1963 has continuously obtained an annual photographer's license under paragraph (a) of the license schedule, the City License Officer served the citation attached as an Exhibit hereto upon J. C. Penney Company, though the City License Officer well knew of Plaintiff and Plaintiff's activities, and knew that paragraph (d) was inserted in the Schedule to apply to Plaintiff's activities and not to J. C. Penney Company.

> The issuance of the citation to J. C. Penney Company rather than to Plaintiff was done for the purpose of preventing Plaintiff from gaining access to this Court to test the validity of paragraph (d) of the License Schedule since the paragraph did not and could not apply to J. C. Penney Company, but Plaintiff was excluded from the citation to prevent Plaintiff from testing the paragraph in this Court."

Now, Supernumerary Circuit Judge Simmons holds as a matter of law, that upon these allegations Penney does owe this license and Dunbar-Stanley's rights guaranteed under the Federal Constitution cannot be reviewed by this Court in this case.

This Court has responded to this sort of argument concerning a decision by the Supreme Court of Alabama calculated to forestall review of its action in ignoring claims for protection of constitutional rights against flagrant violations thereof in **N. A. A. C. P. v. Alabama,** 357 U. S. 449, 457 (1958), cited on page 16 of Jurisdictional Statement:

> "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."

We have tested the validity of city licenses in actions for declaratory judgment with the City of Mobile.

> **Mobile Battle House v. City of Mobile,** 262 Ala. 270, 78 So. 2d 642 (1955).

And a mere demand for a license has been held sufficient to create a justiciable controversy.

> **Brown v. Southern Cigarette Co.,** 269 Ala. 539, 114 So. 2d 387 (1959).

A fortiori, a threat to jail employees as alleged in the Bill, should satisfy the requirement for justiciable controversy.

Hence, our reliance on declaratory judgment to vindicate federal constitutional rights in this state court was justified. To permit the State Court to thwart this effort by these new procedural requirements in this case will put constitutional rights at the mercy of bizarre state court procedural rules. Furthermore, Justice Jackson's observation in **Shapiro v. U. S.**, 335 U. S. 1, 70 (1948) cannot be ignored, where he commented on

> "The tendency of * * * a principle once approved, to expand itself in practice 'to the limits of its logic'."

It is to review this action that this appeal has been taken and these questions are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

DUNBAR-STANLEY STUDIOS, INC. *v.* CITY OF MOBILE.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 377. Decided March 10, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.